90 No. 1275

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In The Supreme Court Of The United States

OCTOBER TERM, 1990

JOSEPH PIERRE RENE SCOVEL,
Plaintiff-Appellee,
Petitioner,

v.

NORFOLK SHIPBUILDING &
DRYDOCK COMPANY, INC.
Defendant-Appellant,
Respondent.

ON CERTIORARI TO THE
SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May the Supreme Court of Virginia refuse to apply the general maritime law definition of proximate cause to a maritime tort?

DESIGNATION OF PARTIES

The parties to the appeal before the Supreme Court of Virginia were Joseph Pierre Rene Scovel, plaintiff-appellee, and Norfolk Shipbuilding & Drydock Company, Inc., defendant-appellant. Said parties are the same as were before the court of original jurisdiction, the Circuit Court for the City of Norfolk, Virginia.

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OPINIONS BELOW

The opinion of the Supreme Court of Virginia sought to be reviewed is published as Norfolk Shipbuilding & Drydock Company, Inc. v. Joseph Pierre Rene Scovel, 7 VLR 911 (1990) and is reproduced in the appendix, infra pp. 1-13. The circuit court slip opinions and orders which are relevant to the issue raised are reproduced in the appendix, infra pp. 14-20.

JURISDICTIONAL STATEMENT

Jurisdiction is invoked pursuant to 28 U.S.C. § 1257. The Supreme Court of Virginia entered judgment on November 9, 1990. The instant petition for writ of certiorari is timely filed pursuant to Rules 29.2 and 29.3 of the Supreme Court Rules.

STATEMENT OF THE CASE

This is an action brought by an able-bodied seaman, Joseph Scovel (hereinafter "Scovel"), who was injured aboard his vessel while the vessel was moored to a Norfolk Shipbuilding and Drydock Company, Inc. (hereinafter "Norshipco") dock on navigable waters. At the time of the incident, Scovel was performing routine maintenance to prepare the USNS STALLWORTH for sea. Scovel was injured by a Norshipco worker who was aboard the vessel to aid in the loading of ship's stores. Scovel had been working all day in the bow thruster room of the vessel applying acid to the deck to prepare the steel for painting. Six feet above Scovel,

shipyard employees were working with a shore-based crane and pallet, loading ship's stores for the vessel. All hatch covers to the decks above Scovel had been removed. As Scovel was working in a crouched, kneeling position, applying acid to the deck, directly under the open hatch where ship's stores were being unloaded, a Norshipco employee threw balled up paper into the lower hold striking Scovel on the leg. Scovel jumped up and "wrenched and twisted" his back.

Another seaman aboard the USNS STALLWORTH, Ron Billips (hereinafter "Billips"), was standing on the main deck adjacent to the hatch leading down to the bow thruster room where Scovel was working. Billips testified

that he saw a Norshipco employee ball up and throw a candy wrapper through the hatch leading to the bow thruster room. This conduct violated Norshipco's own published safety regulations.

Scovel filed suit in state court against Norshipco as a result of the injuries he sustained. Scovel specifically pleaded entitlement to the benefits of the general maritime law of the United States. During the trial, Scovel proved that he was an able-bodied seaman injured while performing routine maintenance work aboard a vessel in navigable waters.

Scovel's suit was tried to a jury. The trial court applied the general maritime law of negligence -

the standard for a seaman suing a third-party tortfeasor for an injury occurring on navigable waters.

The trial court allowed the jury to determine whether Norshipco was negligent and proximately caused Scovel's injuries. After due debate, the jury returned its verdict in favor of Scovel.

Norshipco appealed the jury verdict to the Supreme Court of Virginia contending that Scovel did not present sufficient evidence to sustain a finding of negligence and that the injury which resulted from the negligence was not foreseeable. Norshipco's Brief to the Virginia Supreme Court cited both maritime and non-maritime case law. On appeal,

Norshipco contended for the first time that Virginia law, rather than the general maritime law, governed the proximate cause analysis of Scovel's maritime tort claim.

The Supreme Court of Virginia erroneously concluded that "the trial court instructed the jury in the law of this Commonwealth." (Appendix p. 7, note 1.) It did not. Rather, the trial court's instruction directly tracked the general maritime law standard set forth in Dalldorf v. Higgerson-Buchanan, Inc. and Daigle v. Point Landing, Inc., infra.

ARGUMENT FOR ALLOWANCE OF THE WRIT

A. The Standards of Maritime Law Govern the Analysis of a Maritime Tort.

Historically, a tort is "maritime" in nature, and subject to admiralty jurisdiction and the application of federal maritime law, if the wrong occurred on navigable waters and bears a significant relationship to traditional maritime activity. Executive Jet Aviation v. City of Cleveland, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972).

The undisputed evidence presented at the trial court level demonstrated that Scovel was an able-bodied seaman injured aboard a vessel in navigation on navigable waters. At trial Scovel was questioned regarding his

employment aboard the USNS STALLWORTH. Scovel testified that he was hired to work as an able-bodied seaman (AB):

> "A. Look, Joe, we've got a boat over there in the Yard. We're short an AB. Would you mind going over there and filling in?" I said, "No. I don't mind at all." That was somewhere around the end of February. I don't have my -- You'd have them.
>
> Q. How many days before you were injured, Joe, did you go to work onboard this particular vessel?
>
> A. On the starboard [sic] about three or four days.
>
> Q. What was your rating on that vessel?
>
> A. Able-bodied seaman.
>
> Q. Where was the vessel at the time you were working on there and you were injured?
>
> A. At Norfolk Ship Drydock next to the Campostella Bridge.

Q. Tied up to one of the piers there?

A. At the pier, yes, sir.

Q. That's the Elizabeth River here?

A. Elizabeth River."

. . .

"Q. Now at that particular time were other crew members on the vessel doing work onboard the vessel itself?

A. Yes, sir, they were.

Q. What type of work were they doing, general maintenance work?

A. General maintenance work or whatever the boatswain would assign. The boatswain assigned me down there. sometimes he'd come down and help me and --

Q. Was the captain and the mates onboard the vessel?

A. Yes, sir, they were."

. . .

"Q. At the time you were hurt you were not under any kind of an agreement, but you just understood you were going to have a job on one of their ships when it came in, correct?

A. I was an employee of Sea Mobility at the time I was hurt. The nature of our employment was that we'd take a trip and then we'd get off, somebody else gets on, and we wait for another ship or if we want to we can stay on it for five or six years as long as they're in operation.

Q. Where do they operate?

A. They operate out of Norfolk and out of Hawaii.

Q. In addition to your $50 per day that you were being paid there were no other benefits connected with that job, were there?

A. None whatsoever.

Q. It was just a straight $50 a day with nc benefits?

A. Yes, sir. I wasn't there for the pay, sir. I was there for the sea time."

In fact, counsel for Norshipco cross-examined plaintiff on his status:

"Q. The license that you have is an AB ticket, is that right?

A. Yes, sir.

Q. You've never had any higher license than that?

A. No, sir. I didn't need it when I was working for Atwood. No, sir. I have never had a higher license than that."

Mr. Ronald Billips, another seaman aboard the STALLWORTH testified regarding his and Joe Scovel's employment:

"Q. Mr. Billips, what is your occupation?

A. Ordinary seaman."

. . .

"Q How long have you been an ordinary seaman?

A. Three years.

Q. Have you had an occasion working as an ordinary seaman to work with Mr. Scovel?

A. Yes.

Q. When did you first work with Mr. Scovel?

A. October the 18th.

Q. Of what year?

A. 1987.

Q. Did you sail together?

A. Yes

Q. How long was that trip?

A. Fifty-eight days."

. . .

"Q. Now in February of 1988 were you working on a vessel?

A. Yes.

Q. What vessel was that?

A. USNS STALWARTH.

Q. Were you working with Mr. Scovel?

A. Yes.

Q. When you joined that vessel in 1988 was Mr. Scovel already working aboard it?

A. Yes, he was.

Q. What was he doing?

A. He was working in the bow thruster.

Q. He was working as a seaman?

A. Yes.

Q. What was your job?

A. Mostly anything on there.

Q. Were you also working as a seaman?

A. Yes."

Norshipco did not object to the testimony regarding Scovel's status as a seaman. Norshipco did not offer any

evidence in the trial court to challenge Scovel's status as a seaman performing a traditional maritime activity - preparing a vessel to go to sea.

Scovel was injured aboard a ship on navigable waters. As a result, the law of the State of Virginia is inapplicable. "The legal rights and liabilities arising from [the injury are] within the full reach of the admiralty jurisdiction and measurable by the standards of maritime law." Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 628, 79 S.Ct. 406, 408, 3 L.Ed.2d 550, 553 (1959); Southern Pacific Co. v. Jensen, 224 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917). State courts have

concurrent jurisdiction over actions grounded in the general maritime law by virtue of the "Saving to Suitors" clause in 28 U.S.C.A. §1333(1). Garrett v. Moore-McCormack Co., 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239 (1942). However, while jurisdiction to decide the litigation may be concurrent with state courts or invoked in a federal court on some independent basis, maritime law determines the rights of the parties irrespective of where the action is brought. Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946); Chelentis v. Lukenbach S.S. Co., Inc., 247 U.S. 372, 38 S.Ct. 501, 62 L.Ed. 1171 (1918); Kermarec, supra.

The application of federal substantive maritime law in the state court forum preserves the uniformity of maritime law. Uniformity is the key concept. Admiralty law is to be uniform throughout the United States and the primary benefit gained by vesting maritime jurisdiction in the federal courts is the preservation of common rules for the governance of national and international maritime operations. Miles v. Apex Marine Corporation, 498 U.S. ____, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990); Romero v. International Term. Operating Co., 358 U.S. 354, 795 S.Ct. 468, 3 L.Ed.3d 368 (1959); Carlson v. Palmer, 472 F.Supp. 396 (D.Del. 1979). Other state courts have recognized this fact. Gaspard v.

Transworld Drilling Company, 468 So.2d 692 (La.App. 3d Cir. 1985); Rindfleisch v. Carnival Cruise Lines, Inc., 498 So.2d 488 (Fla.App. 3d Dist. 1986); Hurley v. Shinmei Kisen K.K., 779 P.2d 1041 (Or.App. 1989). This Court recently reaffirmed "the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'" Miles, supra, quoting Moragne v. States Marine Lines, Inc., 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970).

B. The Application of Virginia State Law to this Maritime Tort has Undermined the Uniformity of Maritime Law and Defeated an Admiralty Right of Recovery.

Modern maritime law is comprised of the ancient codes and customs of seafaring nations. See, I. M. Norris, The Law of Seaman, § 1:3 (4th ed. 1985). Once admiralty jurisdiction is established, all of the substantive rules and precepts peculiar to the law of the sea become applicable and the plaintiff's cause of action is to be determined under principles of maritime negligence rather than principles of non-maritime state law negligence.

> Negligence is an actionable wrong under the general maritime law. Its elements are essentially the same as

> in land-based negligence actions under the common law, yet free from "inappropriate common law concepts." There must be a duty owed by defendant to plaintiff, breach of duty, prejudice sustained by plaintiff, and a causal connection between defendant's conduct and plaintiff's prejudice. A duty of care exists when injury is foreseeable or when contractual or other relations of the parties impose it. In determining the existence of duty, a court must examine and weigh the probability of an accident, the potential extent of the injury, and the cost of adequate precautions . . . In a negligence action under the general maritime law, the standard of care required of defendant is that of ordinary diligence under the circumstances.

Thomas J. Schoenbaum, Admiralty and Maritime Law, §4-2, "Negligence", (1987).

When there is established general maritime law, state law may not be applied. Wilburn Boat Co. v. Firemen's Fund Ins. Co., 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1955). Specifically:

> [S]tate law may not be applied by a [maritime] court if it would defeat or narrow any substantial admiralty rights of recovery . . . [S]tate law may not be applied to . . . prejudice the characteristic features of maritime law or to disrupt the harmony it strives to bring to international and interstate relations . . . [I]t may be deemed pre-empted if it is in direct contradiction of the uniformity of admiralty law in some respects.

Kalmbach, Inc. v. Ins. Co. of the State of Pennsylvania, 422 F.Supp. 44 (D.Ak. 1976), aff'd. 529 F.2d 552 (9th

Cir. 1976); Moye v. Henderson, 496 F.2d 973 (8th Cir. 1974).

Indeed, this Court has recognized that the general maritime law is to be free from "inappropriate state law concepts." Kermarec, supra. Thus, this Court must eliminate the application of state law principles to the question of proximate cause under the general maritime law - a question requiring national uniformity. Cf., Miles, supra.

The general maritime law standard of negligence has been defined as:

> 'An act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another'. . . or an act or omission involving 'an unreasonable risk of harm to another' . . . 'in general, anyone who does an

> affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act.' Dalldorf v. Higgerson-Buchanan, Inc., 402 F.2d 419 (4th Cir. 1968).

The above maritime standard of care contemplates foreseeability, or the knowledge that a particular conduct will create danger. As stated in Daigle v. Point Landing, Inc., 616 F.2d 825 (5th Cir. 1980), at 827:

> The care which must be exercised in any particular situation is in proportion to the actor's knowledge, actual or imputed, of the danger to another in the act to be performed. The degree of care necessary to constitute the ordinary care required of a person upon any particular occasion is measured by reference to the circumstances of danger and risk known to such person at the time. Conduct which

> will be considered extremely careful under one condition of knowledge, and one state of circumstances, may be grossly negligent with different knowledge and in changed circumstances.[1]

In a maritime setting, an accident that is unprecedented or extraordinary is not necessarily unforeseeable. Gill v. Hango Ship-

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[1]The trial court's charge to the jury closely tracks this very language:

> In order for a defendant's negligence to be the proximate cause of a plaintiff's injury, the defendant need not have anticipated or foreseen the precise injuries sustained, but it is sufficient if an ordinarily careful and prudent person ought, under the same or similar circumstances, to have anticipated that an injury might probably result from the negligent acts.

Owners/AB, 682 F.2d 1070 (4th Cir. 1982). Proof of adherence to an industry practice or custom is not dispositive on the issue of negligence. Tug Ocean Prince, Inc. v. United States, 584 F.2d 1151 (2d Cir. 1978), cert. denied, 440 U.S. 959, 99 S.Ct. 1499, 59 L.Ed.2d 772 (1979).

It is well established that questions of negligence should, if at all appropriate, be left to the determination of the jury. Ordinarily such questions can only be determined by the sifting and appraisal of facts -- matters which are exclusively within the provenance of the jury. Milos v. Sea-Land Service, Inc., 478 F.Supp. 1019 (S.D.N.Y. 1979). Under the general maritime law standard,

proximate cause, including the question of foreseeability of risk, is a question of fact for the jury. Lies v. Farrell Lines, Inc., 641 F.2d 765 (9th Cir. 1981).

Scovel presented uncontradicted evidence that at the time of his accident he was working with acid six feet below a hatch opening where ship's stores were being loaded by a shoreside crane. Scovel presented uncontradicted evidence that a Norshipco employee balled up a candy wrapper and threw it into the lower hold in violation of Norshipco's own published safety regulations. Scovel presented uncontradicted evidence that he "wrenched and twisted" his back

when he was struck by the falling object.

Despite this, the Supreme Court of Virginia improperly took the question of proximate cause from the jury. The Court applied Virginia law and its own "controlling precedents" of non-maritime cases to determine that the Petitioner's evidence did not support a finding of actionable negligence.

By applying state law, the Supreme Court of Virginia deviated from the applicable general maritime law standard and applied an "inappropriate common law concept" (Kermarec, supra.) to defeat Scovel's admiralty right of recovery. The holding of the Supreme Court of

Virginia is in direct contradiction of the uniformity of admiralty law and must be reversed.

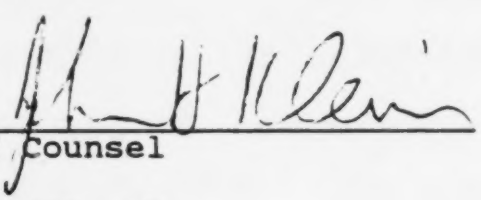
The port of Hampton Roads is one of the fastest growing major ports in the United States. Hampton Roads is the largest coal loading port in the United States. Are the uniform standards applicable to maritime commerce going to be changed by the unilateral action of the court in Virginia?

CONCLUSION

The holding of the Supreme Court of Virginia that non-maritime state law principles of negligence apply to conduct occurring aboard a vessel upon navigable waters decides an important question of federal law in a way that

conflicts with the applicable decisions of this Court. Rule 10.1(c) of the Rules of the Supreme Court requires this Court to exercise its power of supervision. It is respectfully submitted that this Petition for Writ of Certiorari should be granted.

JOSEPH SCOVEL

By 
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APPENDIX

Present: Carrico, C.J., Compton, Stephenson, Whity, Lacy, and Hassell, J.J., and Poff, Senior Justice

NORFOLK SHIPBUILDING & DRYDOCK COMPANY, INC.

v. Record No. 900325

JOSEPH PIERRE RENE SCOVEL

OPINION BY SENIOR JUSTICE RICHARD H. POFF

FROM THE CIRCUIT COURT OF THE CITY OF NORFOLK
Leonard B. Sachs, Judge

The issue we find dispositive of this appeal if whether the evidence supports a finding of actionable negligence.

The facts relevant to that issue are not in dispute. On February 26, 1988, Joseph Scovel, a seaman employed by Sea Mobility, was working in the bow thruster room of USNS Stalworth, a

ship undergoing repairs in the shipyard of Norfolk Shipbuilding & Drydock Company, Inc. (Norshipco). Scovel was engaged in the task of applying acid in preparation for scraping and painting the steel in that room. At the same time, Norshipco employees were loading cases of food onto the main deck above that room. The hatch in the main deck was open. Scovel, crouched in a kneeling posture, was working his way towards the ladder leading to the hatch. He testified that he felt "something hit me on the leg". Scovel said that "it didn't hurt" but that he "jumped up and wrenched and twisted . . . to see what . . . was going on because the hatch . . . was right there."

Ron Billips, a seaman aboard the USNS Stalworth, was standing on the main deck near the open hatch when he heard Scovel "holler". Billips testified that "a couple of seconds" before, he had seen a Norshipco employee throw a candy bar wrapper through the hatch. Scovel testified that while he had not seen anyone thrown anything, he had learned what struck his leg "after it happened" because "[i]t was laying there on the deck." Scovel described it as "a balled up Snicker's candy bar wrapper." Norshipco's book of safety regulations contained a rule requiring employees to "[p]ut all trash in proper receptacles."

Scovel continued to work for several minutes until pain in his back forced him to climb the ladder and seek assistance. He was hospitalized for eight days, and following his release, he remained under the treatment of an orthopedic surgeon who had prescribed detailed work limitations. At the time of trial, Scovel was still suffering pain in his back and numbness in his left leg which have restricted his ability to acquire and hold a job. Scovel acknowledged that he had undergone a back operation at the age of seventeen, that he had suffered an injury to his back in 1981, and that he had had another operation on his back in 1983.

In his motion for judgment, Scovel alleged that Norshipco's employees "caused an object to hit plaintiff causing him injuries", that his injuries were "a direct result of the negligence of the said defendant, its employees or agents", and that the plaintiff was entitled to damages in the sum of $2,000,000.00. At the close of the plaintiff's case in chief and again at the conclusion of all the evidence, the defendant moved to strike on the ground that the evidence was insufficient to prove actionable negligence.

The trial court overruled both motions and, having refused Norshipco's instruction on foreseeability as an element of

actionable negligence, submitted the case to the jury. The jury returned its verdict awarding Scovel $135,000.00. in damages. Reasserting the ground stated in its motions to strike, Norshipco moved to set aside the verdict. The trial court overruled the motion. From a final judgment confirming the jury's verdict, we awarded Norshipco an appeal.

We are of opinion that the trial court erred in overruling Norshipco's motions to strike the plaintiff's evidence. The record indicates that the court was laboring under the mistaken conclusion that foreseeability of probable consequences of negligent conduct is

no longer an element of actionable negligence. Apparently, the conclusion was based upon a comparison of two Virginia jury instruction form books when the court noted that "the instruction of negligence does not include foreseeability in the new book and neither do they have an instruction on defining foreseeability as they have in this [older] one."

The trial court overlooked controlling precedents of this Court.[1]

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[1]Scovel argues on appeal that Virginia law does not apply because, he says, "he was "injured aboard a vessel in navigation on navigable waters" and was, therefore, "a Jones Act seaman entitled to the benefits of the general maritime law." The Jones Act, 46 U.S.C. § 688, extends to seamen the same cause of action afforded railway employees by the Federal Employers' Liability Act (FELA), 45 U.S.C.A. § 51. FELA

> [N]egligence carries with it liability for consequences which, in the light of attendant circumstances, could

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requires a plaintiff to prove negligence "in whole or in part", id., an evidentiary burden lower than that required by the common law for submission to a jury.

For several reasons, that standard does not apply here. First, we do not consider an argument advanced for the first time on appeal. Rule 5:25. Second, the trial court instructed the jury in the law of this Commonwealth, using in part instructions drafted by Scovel; Scovel did not object to those instructions at trial and those instructions became the law of the case. Shamblee v. Transit Company, 204 Va. 591, 594-95, 132 S.E.2d 712, 714 (1963). Third, the Jones Act grants a seaman a statutory cause of action against his employer; the Act is irrelevant to a case such as this brought by a seaman against a third-party tortfeasor.

Moreover, even if the "general maritime law" were applicable to this case, Scovel cites no authority which distinguishes that law from the law of Virginia on the issue of foreseeability.

> reasonably have been anticipated by a prudent man, but not for casualties which, though possible, were wholly improbable. One is not charged with foreseeing that which could not be expected to happen.

Wyatt v. Telephone Co., 158 Va. 470, 479-80, 163 S.E. 370, 373 (1932). Said differently, "a wrongdoer is not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is probable according to ordinary and usual experience." Hair v. City of Lynchburg, 165 Va. 78, 181 S.E. 285 (1935) (excerpt of language from 22 R.C.L. 124, quoted with approval in Wyatt and in Hair).

> "If men were held answerable for everything they did

> which was dangerous in fact, they would be held for all their acts from which harm in fact ensued. Accordingly, in order to impute knowledge of a dangerous thing or place, the danger therefrom must have been such as is recognized by common experience or by the special experience of the actor, or such as might reasonably have been expected by a person of ordinary prudence and of ordinary foresight."

Railroad Company v. Patterson, 204 Va. 81, 85, 129 S.E.2d 1, 4 (1963) (quoting with approval from 38 Am. Jur., Negligence § 24, pages 669-70).[2]

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[2] Finding evidence of foreseeability insufficient, we reversed the trial court's judgment for the plaintiff in Patterson, we affirmed the trial court's award of summary judgment to the defendant in Hair, and we upheld the trial court's ruling setting aside a plaintiff's verdict in Wyatt.

In order for negligence to be actionable, a defendant "need not have anticipated or foreseen the precise injury sustained, but it is sufficient if an ordinarily careful and prudent person ought, under the same or similar circumstances, to have anticipated that an injury might probably result from the negligent acts." New Bay Shore Corp. v. Lewis, 193 Va. 400, 409, 69 S.E.2d 320, 326 (1952); accord VEPCO v. Savoy Const. Co., 224 Va. 36, 46, 294 S.E.2d 811, 818 (1982); VEPCO v. Winesett, 225 Va. 459, 468, 303 S.E.2d 868, 874 (1983).

On brief, Scovel characterizes the tort involved as "the act of . . .

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balling up a candy wrapper into a projectile and throwing it in a heavy machinery work area." For purposes of this opinion, we accept the theory that the failure of Norshipco's employee to deposit the candy wrapper in a proper receptacle as required by published safety regulations was negligent conduct.[3] As we have consistently held, however, a negligent act or omission is actionable only when the actor, in light of attendant circumstances, reasonably should have foreseen the probability of injurious consequences.

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[3]But see Restatement (Second) of Torts § 282 (1965) which defines negligence as an act or omission that creates an "unreasonable risk of harm."

See Simmons v. Baltimore Orioles, Inc., 712 F.Supp. 79, 83 (W.D. Va. 1989) (applying Virginia law).

Viewing the evidence of record in the light most favorable to Scovel, we find nothing to support such a finding of actionable negligence in this case. Accordingly, we will reverse the judgment below, dismiss the motion for judgment, and enter final judgment here for Norshipco.

Reversed and final judgment.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK ON THE 15TH DAY OF DECEMBER, 1989.

JOSEPH PIERRE RENE SCOVEL PLAINTIFF
VS. AT LAW NO. L89-940
NORFOLK SHIPBUILDING & DRYDOCK COMPANY, INCORPORATED DEFENDANT

ORDER

This day came again the plaintiff, Joseph Pierre Rene Scovel, in person and by counsel, and also came the defendant, Norfolk Shipbuilding & Drydock Company, Incorporated, by it's [sic] representative, Winston Smith, and by counsel, and came as well the same jury heretofore impaneled and sworn pursuant to adjournment on the 14th day of December, 1989.

Now the Court and the jury, having heard all of the evidence in

this matter and after receiving the instructions from the Court and hearing the closing arguments of counsel, the jury retired to the jury room to consider their verdict and after some time, the jury returned into open court with a verdict in the following words: "We the jury find our verdict in favor of the plaintiff and award damages in the sum of $135,000. /s/ Sharon M. Ventura, Foreperson".

Thereupon, the Court polled the jurors as to their said verdict to which poll, the Jurors gave his or her assent to the said verdict. And the jury was discharged.

Whereupon, the defendant, by counsel moved the Court to set aside

the verdict of the Jury as being contrary to the law and the evidence and enter summary judgment, which motion after having been fully heard and maturely considered by the Court, was overruled, to which action of the Court, the defendant, by counsel, noted their exception.

Whereupon, it is considered and ORDERED by the Court that the plaintiff recover of and have judgment against the defendant, Norfolk Shipbuilding & Drydock Company, Incorporated in the sum of One Hundred Thirty-Five Thousand Dollars, ($135,000) with interest at the legal rate of interest from the 14th day of December, 1989 until paid. And it is further ORDERED that this case is now

removed from the open docket of this Court.

ENTERED: 12/18/89
/s/ Leonard B. Sachs
LEONARD B. SACHS, JUDGE

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK ON THE 14TH DAY OF DECEMBER, 1989.

JOSEPH PIERRE RENE SCOVEL PLAINTIFF
VS. AT LAW NO. L89-940
NORFOLK SHIPBUILDING & DRYDOCK COMPANY, INCORPORATED DEFENDANT

ORDER

This day came the plaintiff, Joseph Pierre Rene Scovel, in person and by counsel, and also came the defendant, Norfolk Shipbuilding & Drydock Company, Incorporated, by it's [sic] representative, Winston Smith, and by counsel, and thereupon came a jury to-wit: Betty J. Bell, Elder R.C. Church, Barbara A. Cochrane, Sadie E. Hope, Joanne C. Mello, Burma B. Thomas and Sharon M. Ventura, all of whom were duly sworn the truth to speak upon the issue joined.

Thereupon, at the conclusion of the plaintiff's evidence, the defendant moved the Court to strike the plaintiff's evidence and enter summary judgment in their behalf, which motion was overruled and the defendant, by counsel, noted their exception.

Whereupon, at the conclusion of all the evidence, the plaintiff, by counsel, moved the Court to strike and submit on damages, which motion after being fully heard and maturely considered by the Court, was overruled, to which action of the Court, the plaintiff, by counsel, noted his exception.

Furthermore, at the conclusion of all the evidence, the defendant, by

counsel, moved to strike the evidence and enter summary judgment, which motion after being fully heard and maturley [sic] considered by the Court, was overruled, to which action of the Court, the defendant noted his exception.

Now the jury, having heard all of the evidence, the Court was adjourned at 4:30 p.m. to resume at 10:00 a.m. on Friday, December 15, 1989.

ENTERED: 12/18/89
/s/ Leonard B. Sachs
LEONARD B. SACHS, JUDGE

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No. 90-1275

FILED
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OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1990

JOSEPH PIERRE RENE SCOVEL,
Plaintiff-Appellee,
Petitioner,

v.

NORFOLK SHIPBUILDING &
DRYDOCK COMPANY, INC.
Defendant-Appellant,
Respondent.

ON CERTIORARI TO THE
SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(A) Whether the United States Supreme Court should exercise its discretion and review, by writ of certiorari, a final judgment of the Supreme Court of Virginia, which refused to apply general maritime law of negligence in this case?

(B) Whether review by the United States Supreme Court is barred by the Petitioner's failure to properly and timely raise the issue of whether general maritime law of negligence or Virginia common law should have been applied by the trial court?

(C) Whether the United States Supreme Court should review the decision of the Virginia Supreme Court when the ruling of the Virginia Supreme Court would be the same, regardless of whether maritime law or Virginia law of negligence had been applied?

LIST OF PARTIES AND RULE 29.1 LIST

The Petitioner in this case is Joseph Pierre Rene Scovel. The Respondent is Norfolk Shipbuilding and Drydock Company, Inc.[1]

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[1]Pursuant to Sup. Ct. R. 29.1, Respondent, Norfolk Shipbuilding & Drydock Company, Inc. states that the Flagship Group, Limited, Flagship Financial Corporation, States Roofing Corporation, Marepcon Corporation International, Marepcon Financial Corporation and Aalborg Ciserve Norfolk, Inc. are affiliates thereof. They are corporations registered in the Commonwealth of Virginia and whose stock is partially owned by the Petitioner.

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No. _____

In The

Supreme Court of the United States

October Term, 1990

JOSEPH PIERRE RENE SCOVEL,
Plaintiff-Appellee,

Petitioner,

v.

NORFOLK SHIPBUILDING &
DRYDOCK COMPANY, INC.
Defendant-Appellant,

Respondent,

ON CERTIORARI TO THE
SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of Virginia is published as Norfolk Shipbuilding & Drydock Company, Inc. v.

Joseph Pierre Rene Scovel, 7 V.L.R. 911 (1990).

STATEMENT OF THE CASE

The Petitioner, Joseph Pierre Rene Scovel ("Scovel" or the "Petitioner") in his Petition for Writ of Certiorari filed herein has alleged certain facts which are not accurate and therefore misleading. First, Scovel repeatedly characterizes himself as an "able-bodied seaman" but the suit which he filed in the Circuit Court for the City of Norfolk, Virginia, against Norfolk Shipbuilding & Drydock Company, Inc. ("Norshipco" or the "Respondent") is not a Jones Act case and therefore such characterization is irrelevant to the court's consideration of the facts (Pet. at 9, 15-21). The Jones Act, which extended the provisions of the Federal

Employers' Liability Act, y45 U.S.C. § 51 et seq. to seamen, provides a seaman with a negligence action against his employer, which actions had previously been barred by a number of common laws rules that hindered an employee's recovery against his employer. See 46 U.S.C. app. § 688 (1987). The Jones Act does not apply to suits by a seaman against an entity that did not employ him.

There is no dispute in this case that Norshipco was not the employer of Scovel. Rather Scovel's employer was Sea Mobility (Pet. at 9, App. 1-2). For Scovel to continue to emphasize his status as an able-bodied seaman when it is clear from the record that this suit was not a Jones Act suit is misleading and deceptive.

Second, Scovel states that "the trial court applied the general maritime

law of negligence -- the standard for a seaman suing a third-party tort feasor for an injury occurring on navigable waters." (Pet. at 11, 12-13). This is plainly incorrect. The law applied by the trial court and offered by both Scovel and Norshipco as instructions to the jury was the law of Virginia, not general maritime law (Pet. at App. 8). At no point during the trial did the Petitioner object to the court's granting of jury instructions based on general Virginia law. Id. In addition, Petitioner himself offered the court jury instructions based on Virginia law.

Further, the court's jury instruction on negligence and proximate cause was taken directly from a Virginia jury instruction form book. Scovel implies, however, that the jury instruction was based on the maritime law standard set

forth in Dalldorf v. Higgerson-Buchanan, Inc. and Daigle v. Point Landing, Inc. when he states that the jury instruction "tracks" that standard (Pet. at 13). While the jury instruction may "track" the maritime law of negligence in that the two standards are the same, it is erroneous for Scovel to imply that the jury instruction was based on maritime law.

Third, Scovel states that "on appeal, Norshipco contended for the first time that Virginia law, rather than general maritime law, governed the proximate cause analysis of Scovel's maritime tort claim." (Pet. at 12-13). Norshipco's reason for contending this was to respond to Scovel's contention, raised for the first time, not by cross-error as would have been the proper way for Scovel to assert that issue, but

merely in Scovel's Brief in Opposition to Norshipco's appeal to the Virginia Supreme Court.

In summary, this action was brought by Scovel as a personal injury claim against Norshipco. The alleged injury occurred while Scovel was working as an employee of Sea Mobility aboard a vessel undergoing repairs in the shipyard of Norshipco. The primary issue was whether the injury which occurred was a foreseeable consequence of the act of dropping a candy bar wrapper down the hatch of a ship. The case was tried under the Virginia law, not the general maritime law, of negligence, to a jury, with no objection raised at the trial level by Scovel to the law applied (and in fact Scovel himself offered instructions based on Virginia law). The jury returned a verdict for the plaintiff

and Norshipco appealed to the Virginia Supreme Court on grounds that the court should have granted Norshipco's Motions to Strike or Motion to Set Aside the Verdict and that the court improperly instructed the jury on the Virginia standard for negligence and foreseeability.

Although Scovel filed a cross-appeal he did not assign as error the issue of whether Virginia or general maritime law of negligence should have been applied. Scovel raised this issue for the first time only in opposition to Norshipco's appeal. The Virginia Supreme Court, in reversing the lower court judgment and entering final judgment for Norshipco, applied Virginia law, not maritime law. The court's reasoning in not applying general maritime law was threefold. First, the court held that Rule 5:25 of

the Rules of the Supreme Court of Virginia barred the court from considering an argument advanced for the first time on appeal.[2] Second, because Scovel did not object to the instructions given by the trial court to the jury, the court ruled that those instructions became the law of the case. Third, the court found that the Jones Act does not apply because this was not a suit against an employer but against a third-party.[3]

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[2]Rule 5:25 states that "Error will not be sustained to any ruling of the trial court or the commission before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice."

[3]Scovel, in his Brief in Opposition to Norshipco's appeal to the Virginia Supreme Court argued that this was a Jones Act case and, alternatively, that general maritime law, as opposed to the lower standard of negligence applied in Jones Act cases, should have been applied. In his Petition for Writ Certiorari, however, he only argues that

Notwithstanding the above recited reasons for not applying maritime law, the court further stated that even if general maritime law was applicable to the case, Scovel had cited no authority which distinguished that law from the law of Virginia on the issue of foreseeability (Pet. at App. 7-8).

Scovel now petitions this Court for a writ of certiorari on the grounds that the Virginia Supreme Court should have applied the general maritime standard of negligence.

SUMMARY OF REASONS FOR DENYING THE WRIT

First, there is no federal question drawn into question by the ruling of the Virginia Supreme Court because the right to have general maritime law applied is

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general maritime law should have been applied.

not a right, title, privilege or immunity set up or claimed under the Constitution.

Second, Petitioner waived his right to review by this Court by failing to timely raise and preserve the issue of whether or not general maritime law applies.

Third, the Virginia Supreme Court correctly determined that the standards for negligence and foreseeability are the same under both Virginia and maritime common law, so that even if maritime law had been applied the result would be the same.

REASONS FOR DENYING THE WRIT

(A) There was no federal question involved in the decision of the Virginia Supreme Court and therefore this Court should decline to review that ruling.

Regardless of whether or not the Virginia Supreme Court should have

applied the general maritime law of negligence as Petitioner argues as opposed to Virginia common law standards of negligence, the decision to apply Virginia law rather than general maritime law of negligence does not give the Petitioner the right to a review of the Virginia Supreme Court's decision by the United States Supreme Court because no federal question has been drawn into issue.

Under 28 U.S.C. § 1257(a) (1988), final judgments rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court by a writ of certiorari where "any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States." A review of the Petition for Writ of

Certiorari reveals that Petitioner claims that his right to general maritime law is a right claimed under the Constitution. It clearly is not.

The Supreme Court's jurisdiction to review a state court decision under 28 U.S.C. § 1257 is dependent upon the presence of a federal question in the case. See St. Louis, Iron Mountain & Southern Railway Co. v. Taylor, 210 U.S. 281, 28 S.Ct. 616, 52 L.Ed. 1061 (1908). General maritime law is not an action arising under the Constitution, laws or treaties of the United States. See Romero v. International Terminal Operating Co., 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959); Harbor Boating Club, Inc. v. Red Star Towing and Transportation Co., 179 F.Supp. 755 (E.D.N.Y. 1960).

In Romero this Court ruled, in a lengthy analysis of the origins and jurisdiction of maritime law, that there was no federal question involved in a seaman's personal injury claim, not brought under the Jones Act, and therefore the law side of the United States District Court did not have jurisdiction over that claim under 28 U.S.C. § 1331. 358 U.S. at 359-389, 3 L.Ed.2d at 375-387.

As stated in Romero,

> [a]lthough the corpus of admiralty law is federal in the sense that it derives from the implications of Article III [of the U.S. Constitution] evolved by the courts, to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce.

358 U.S. at 373, 3 L.Ed.2d at 382.

See also, Poole v. Lykes Brothers Steamship Co., 273 F.2d 423 (5th Cir. 1959), reh'g. denied, 274 F.2d 666 (5th Cir. 1960); Harbor Boating Club, Inc. v. Red Star Towing and Transportation Co., 179 F.Supp. 755 (D.C.N.Y. 1960) (holding that action for negligence under general maritime law is not an action arising under the Constitution, laws or treaties of the United States).

Although Petitioner does not state any specific jurisdictional grounds under which he is invoking the Supreme Court's jurisdiction to hear this matter, Respondent assumes that Petitioner is implying that Article III, § 2, Cl. 1 of the United States Constitution, which grants to the federal courts jurisdiction over admiralty and maritime cases, converts all general maritime law questions into federal questions.

The Romero decision, however, makes it clear that the grant of jurisdiction to the federal courts under Article III of the Constitution does not convert a maritime tort into a federal question, absent a statutory cause of action. Thus, because it is clear that there is no federal question involved in the Virginia Supreme Court's decision not to apply general maritime law in this case, this Court should refuse to grant Petitioner's Petition for Writ of Certiorari.

(B) The Petitioner failed to properly and timely raise the issue of whether general maritime law of negligence or Virginia common law applies and therefore further review of this issue by this Court is barred.

Although there is no express time period for raising a federal issue in state court, failure to raise the issue

in accordance with state practice constitutes a waiver of that point which bars Supreme Court review. See Herndon v. Georgia, 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530 (1935); Louisville & Nashville Railroad Co. v. Woodford, 234 U.S. 46, 34 S.Ct. 739, 58 L.Ed. 1202 (1914); Erie Railroad v. Purdy, 185 U.S. 148, 22 S.Ct. 605, 46 L.Ed. 147 (1902). The failure of a petitioner to preserve an error for appeal by properly making exceptions or assigning errors at the trial level will result in the waiver of a federal question. Id.

In Louisville & Nashville Railroad Co., the petitioner failed to raise the issue of whether the contract in question was unconstitutional until after the trial was over. In addition, and of importance to the case at hand, the petitioner offered jury instructions

inconsistent with his later claim of the applicability of a federal statute. 234 U.S. at 51, 58 L.Ed. at 1207.

In holding that it did not have jurisdiction to review the state court decision, this Court stated as follows:

> The decisions of this court not only have repeatedly held that a Federal right, in order to be reviewable here, must be set up and denied in the state court, but have often held that such claim of denial is not properly brought to the attention of this court where it appears that the state court declined to pass upon the question because it was not raised in the trial court, as required by the state practice.

234 U.S. at 51, 58 L.Ed. at 1208.

Neither is the Petitioner's right to review affected by the fact that he pleaded entitlement to the benefits of general maritime law in his initial Motion for Judgment filed in state circuit court. The failure to raise that as an issue at the trial, even though he

may have put it in his initial pleading, as well as offering jury instructions inconsistent with that view, prohibits him from raising it in his Petition for Writ. See Erie Railroad v. Purdy, 185 U.S. at 152-154, 46 L.Ed. at 850.

Here, Petitioner failed to properly raise and preserve for appeal the issue of whether general maritime law applied to his case. Not only did he offer no objection to the application of Virginia common law on negligence, he offered jury instructions, accepted by the court, based on Virginia law. Consequently, the Virginia Supreme Court refused, on procedural grounds, to consider the argument, raised for the first time on appeal, that the trial court applied the wrong law. Thus, even if the right to the application of general maritime law is a federal right, Petitioner waived his

claim of a federal question, and therefore this Court should deny Petitioner's Petition for Writ of Certiorari.

(C) Even if general maritime law should have been applied to this case, the law coincides with that of Virginia and, therefore, regardless of which law the court applied, the ruling of the Virginia Supreme Court would remain the same.

Even if general maritime law governs this case, rather than Virginia law, because the two laws coincide, the Virginia Supreme Court's ruling in reversing the lower court's judgment and entering judgment for the Respondent would remain the same. Thus, there are no special or important reasons which would compel this Court to review this case. To grant Petitioner's Petition would be a waste of both the Court's time and that of the litigants.

Courts sitting in admiralty and applying negligence standards rely upon general negligence principles. For example, the Fourth Circuit, in determining the general maritime law of negligence, has referred to the Second Restatement of Torts and the Fifth Circuit uses a number of treatises and case law, including the state case law of that circuit, in determining negligence standards in a maritime context. See Consolidated Aluminum Corp. v. C.F. Bean Corp., 833 F.2d 65 (5th Cir. 1987), cert. denied, 486 U.S. 1055 (1988); Gill v. Hango Ship-Owners/AB, 682 F.2d 1070 (4th Cir. 1982); Daigle v. Point Landing, Inc., 616 F.2d 825 (5th Cir. 1980); Dalldorf v. Higgerson-Buchanan, Inc., 402 F.2d 419 (4th Cir. 1968).

Both general maritime law and Virginia law recognize that the duty

which is owed to a plaintiff is a duty of reasonable or ordinary care. See, e.g., Daigle, 616 F.2d at 460; Smith v. Lamar, 212 Va. 820, 823, 188 S.E.2d 72 (1972); Braxton v. Flippo, 183 Va. 839, 844-845, 33 S.E.2d 757 (1945).

The following jury instruction on negligence was offered by the trial court to the jury in this case:

> Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances, or in failing to do something that a reasonably careful person would do under like circumstances.

A comparison of this instruction to the negligence standard applied by courts under general maritime law reveals that the two are the same. In Dalldorf v. Higgerson-Buchanan, Inc. the court,

quoting from the Restatement (Second) of the Law of Torts, defined negligent conduct as "an act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another." Id. at 422. Dalldorf, continuing to cite the Restatement, states that "[i]n general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against unreasonable risk of harm to them arising out of the act." Id.

Most importantly for the case before the Court, both general maritime law and Virginia law require that in order for negligence to be actionable, the conduct must be foreseeable. See, e.g. Gill v. Hango Ship-Owners/AB, 682 F.2d at 1074; Jordan v. Jordan, 220 Va. 160, 162, 257 S.E.2d 761 (1979).

The standard for foreseeability is defined the same under both Virginia and maritime law. The Virginia definition of foreseeability applied by the Virginia Supreme Court is as follows:

> . . . liability for consequences which, in the light of attendant circumstances, could reasonably have been anticipated by a prudent man, but not for casualties which, though possible, were wholly improbable. One is not charged with foreseeing that which could not be expected to happen.

(Pet. at App. 8-9, citing to Wyatt v. Telephone Co., 158 Va. 470, 479-80, 163 S.E. 370, 373 (1932)). Said differently, "a wrongdoer is not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is probable according to ordinary and usual experience." (Pet. at 9, citing to Hair

v. City of Lynchburg, 165 Va. 78, 181 S.E. 285 (1935)).

Just as the Virginia courts distinguish between those consequences which are probable and therefore can be anticipated, and those consequences which are merely possible in determining foreseeability, so does general maritime law. As stated by the Court in Consolidated Aluminum, harm is foreseeable if it "might have been anticipated by a reasonably thoughtful person, as a probable result of the act or omission, considering the interplay of natural forces and likely human intervention." Consolidated Aluminum at 68.

Although Plaintiff implies that maritime law is different from Virginia law of negligence and therefore he was prejudiced by the application of

Virginia law, he contradicts himself in his Petition by stating that the trial court's instruction to the jury "tracked" the general maritime law standard set forth in Dalldorf v. Higgerson-Buchanan, Inc. and Daigle v. Point Landing, Ind. (Pet. at 13).

The primary issue at the trial of this case was whether the alleged injury to Petitioner was a foreseeable consequence of the Respondent's act. Because the standard for foreseeability under maritime law is the same as under Virginia law, the Virginia Supreme Court's ruling that there was no evidence of actionable negligence would have been the same under maritime law. There is no reason why this Court should reconsider this case when the outcome would be the same and, therefore, the Court should

deny Petitioner's Petition for Writ Certiorari.

CONCLUSION

For all of the foregoing reasons, Respondent, Norfolk Shipbuilding & Drydock Company, Inc. requests that the Court deny the Petition for Writ of Certiorari filed by Petitioner, Joseph Pierre Rene Scovel.

Respectfully submitted,

By:_____

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